Opinion of the United States Court of Appeals for the Fifth Circuit Dated March 23, 1973

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3131

Summary Calendar*

DEBRA MILLENSON, On Behalf of Herself and all Others Similarly Situated,

Plaintiff-Appellant,

versus

THE NEW HOTEL MONTELEONE, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(March 23, 1973)

Before:

GEWIN, COLEMAN and MORGAN,

Circuit Judges.

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* Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, 431 F.2d 409, Part I.

PER CURIAM: On May 18, 1972, Ms. Debra Millenson filed the present action seeking declaratory and injunctive relief against the New Hotel Monteleone (hotel) to enjoin its operation of a restaurant, "The Men's Grill", and declaring its "males only" admission policy unconstitutional.[1] On August 23, 1972, the district court denied Millenson's motion for summary judgment and granted the hotel's motion to dismiss. Millenson appeals from the judgment of the district court. We affirm.

Taking the allegations contained within the complaint as true, the following fact situation is established. On May 18, 1972, Ms. Millenson and several companions, men and women, sought service at the Men's Grill of the Hotel. Although there were vacant tables and other parties without reservations were seated, Millenson and her party were denied service because of the presence of women in her party.[2]

Ms. Millenson contends that the admission policies of the grill are unconstitutional because they violate the equal protection clause of the fourteenth amendment. Of course

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[1] Ms. Millenson based her right to relief on 42 U.S.C. 1983. Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1343(3) and 1343 (4).

[2] The hotel does not deny to women access to all its facilities. The coffee shop, the main dining room, and room service are made available to women on the same basis as men. The food and drink served in various parts of the hotel are all prepared in a centralized kitchen. The motivation for the grill's admission policies is clearly and chauvinistically established by a hotel advertisement which reads:

> Lunch for the liberated male
>
> Women. Bless them. They're the most delightful creatures on earth. But there are times when a man prefers the company of other men. To discuss business for instance, politics, sports, or, of course . . . women.

for such a claim to withstand close judicial scrutiny, it is incumbent on the aggrieved party to prove that the actions complained of were taken under color of state law.[3] To fulfill this assigned task Millenson contends that the various licenses issued to the hotel by Louisiana so intertwine the policies of the hotel with state authority that impermissible state action is present.[4] Accordingly, the dispositive issue in the instant case is whether the issuance of regulatory licenses to a public accommodation by a state will suffice to color the admission policies of the former with the authority and involvement of the latter.

For Millenson to succeed it is necessary for her to show that the state licensing system encourages, mandates, or affirmatively authorizes the admission policies of the grill.[5]

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[3] "... § 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections. As was said in Shelley v. Kraemer, supra, § 1 of 'that Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'" Adickes v. S. H. Kress & Co., 398 U.S. 144, 169 (1970) (citations omitted).

[4] Paragraph six of Millenson's complaint alleged:

"The Men's Grill has a liquor license as required by Title 26 of the Louisiana Revised Statutes. The Hotel collects sales tax on transactions in the Grill as an agent of the State of Louisiana as provided in Louisiana Revised Statutes, Title 47, Section 306 and receives a rebate on such taxes pursuant to Section 56-43 of the New Orleans City Code."

Paragraph eight concluded:

"All acts alleged in this complaint to have been done or omitted by defendants or their agents were done or omitted under color of law of the State of Louisiana and under color of defendant's position as an agent of the State under Revised Statutes 47:306 and Title 26."

It is apparent that Millenson's state action argument must stand or fall under these allegations.

[5] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965 (1972).

A cursory examination of these state licensing statutes manifestly leads one to the conclusion that they are completely unrelated to the admission policies of the licensees.

The impetus for the grill's admission policies originated with the hotel and not with the state. Justice Rehnquist's observations in *Moose Lodge,* are equally applicable and decisive of Millenson's contentions. Justice Rehnquist stated:

> There is no suggestion in this record that the Pennsylvania Act, either as written or as applied, discriminates against minority groups either in their right to apply for club licenses themselves or in their right to purchase and be served liquor in places of public accommodation.
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> • • •
>
> However detailed this type of regulation may be, in some particulars it cannot be said to in any way foster or encourage racial discrimination, nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the Club's enterprise.[6]

The judgment of the district court is AFFIRMED.

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[6] Id. at 1972-73.

Order of United States Court of Appeals for the Fifth Circuit Denying Rehearing and Rehearing en Banc Dated May 9, 1973

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3131

DEBRA MILLENSON, On Behalf of Herself and all Others Similarly Situated,

Plaintiff-Appellant,

versus

THE NEW HOTEL MONTELEONE, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 23, 1973, 5 Cir., 1973, —— F.2d ——).

(May 9, 1973)

Before:

GEWIN, COLEMAN and MORGAN,

Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Opinion of the United States District Court for the Eastern District of Louisiana Granting Defendant's Motion for Summary Judgment (excerpted from Transcript of Hearing before the Honorable Jack M. Gordon, August 23, 1972, pp. 22-26)

The Court: All right. I have studied the matter. I have studied your briefs and appreciate your argument. I'm ready to rule. I'm going to grant the summary judgment requested by the defendant dismissing the action for failure to state a cause of action, upon which relief may be granted. My reasons are so simple. I think the law as stated by the Supreme Court in the *Moose Lodge* case is so clear that I'll merely state my reasons orally.

In the first place, we must keep matters in context. We must not confuse the public accommodations provision of the Civil Rights Act of 1964, which all parties here admit is inapplicable, because it does not prohibit discrimination on the basis of sex. Therefore, to the extent that certain cases have been cited, which arose under the Civil Rights Act, public accommodations provisions, the Court must consider them to be inapposite. The plaintiff here contends that the action of the Monteleone Hotel in operating a part of its facility as a men's grill becomes State action because of extensive State regulation. Therefore, two questions must be asked and answered. If the first threshold question, assuming in arguendo that the plaintiff was correct and that State involvement was sufficiently significant so as to make the action of the Monteleone a State action, would this be the type of discrimination prohibited by the equal protection clause of the Fourteenth Amendment? I conclude as a threshold proposition that it would not; that even though the Supreme Court may have said that sexual

discrimination is suspect, it is not referring—has not referred to this type of sexual discrimination, which indeed is, in the factual situation here present, in this Court's opinion greatly stretching the point to even refer to it as discrimination. Indeed, I would leave to the sophist the proposition of stating that the Monteleone is discriminating when it has most all of its facilities, with the exception of the Men's Grill and so far as I know, rest rooms available on a non-discriminatory basis to the sexes. However, it is clear that if it were a State action, it would have to be invidious discrimination. As I stated, I do not consider this discrimination to be invidious. I consider that the operation of a men's grill is something which is within the right. After all, private property owners still have rights guaranteed under the Constitution. One of those rights is to operate their business in a fashion which does not contravene more important rights of others and to the extent that the Monteleone feels that its opportunity to attract clientele by virtue of the Men's Grill operation, I don't feel that this in any way inhibits the rights of the plaintiff in this case. I think there are copious places both in and around the Monteleone where the plaintiff may fully explore dining with clients and others without in any way being subjected to the type of invidious discrimination, which has been referred to in many cases, in which the area has arisen. Thus, even if this were a State action the Court would not consider it invidious. I don't have to reach that however, because I think under the *Moose Lodge* case it is quite clear that the regulations imposed upon the Monteleone Hotel by the State by virtue of regulatory statutes and licensing statutes is not sufficient involvement. Justice Rehnquist made it clear that the Supreme Court has never held that discrimination by an otherwise private

entity would be violative of the equal protection clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to State regulation in any degree, whatever. Since State furnished services include such necessities of life as electricity, water and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in the Civil Rights cases, supra, and adhered to in subsequent decisions. "Our holdings indicate that where the impetus for the discrimination is private, the State must have significantly involved itself with invidious discriminations, in order for the discriminatory action to fall within the ambit of the constitutional provisions."

Now, after going into the detail concerning liquor licensing and I think it is well known by anyone schooled in the law that State involvement in liquor is probably the most intense of any involvement going back to the days of the Whiskey Rebellion, governmental regulation of the whiskey industry. Referring to this involvement the Supreme Court said, "However detailed this type of regulation may be in some particulars it cannot be said to in any way foster or encourage racial discrimination." In this case I don't think it can foster or encourage sexual discrimination, nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise. The limited affect goes on to outline the discrimination, which I won't bother by putting in the record, for this is a quotation from Page 4719 of 40 Law Week, where I feel the Supreme Court made it very clear that the type of involvement, such as the State has in regulation of the Monteleone Hotel does not constitute and make it a State action. Thus for the reason stated, the Court will grant the motion for summary judgment and dismiss the action.